TRIBUNAL TUNTUTAN PEMBELI RUMAH

v.

WESTCOURT CORPORATION SDN BHD & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NOS: W-01-55-2003, W-01-54-2003, W-02-758-2003, W-02-759-2003 & W-02-760-2003]
6 APRIL 2004
[2004] CLJ JT(3)

LAND LAW: *Housing developers - Tribunal for Homebuyer Claims - Threshold jurisdiction - Homebuyers' claims (liquidated damages for late delivery) arising from sale and purchase agreements entered into with developer before 1 December 2002 - Whether tribunal has jurisdiction to hear and determine - Whether Housing Developers (Control And Licensing) (Amendment) Act 2002 operates retrospectively - Social legislation and statutory interpretation - Whether penal element in s. 16AD Housing Developers (Control And Licensing) Act 1966 renders Act incapable of retrospective operation - Whether s. 16AD criminalises breach of sale and purchase agreement or only developer's failure to comply with award of tribunal*

STATUTORY INTERPRETATION: *Construction of statutes - Social legislation - How to construe - Purposive approach - Nature and purpose of Act - Intention of Parliament - Mischief rule - Fair and liberal interpretation - Statutes must be looked at as a whole - Whether literal interpretation suitable - Whether Housing Developers (Control And Licensing) (Amendment) Act 2002 operates retrospectively - Housing Developers (Control And Licensing) Act 1966 - Federal Constitution, art. 7(1) - Criminal law and retrospective operation*

This was an appeal from the decision of the High Court allowing an application by the respondents/developers for *certiorari* to quash the awards handed down by the appellant/tribunal in favour of certain claimants/homebuyers. In allowing the developers' application, the High Court, apart from declaring the said awards as invalid, *ultra vires* and null and void, also declared that the tribunal had no jurisdiction to hear and determine the homebuyers' claims for liquidated damages for late delivery and, in consequence thereof, issued an order

prohibiting the tribunal from adjudicating the same. It was held, essentially, that the tribunal lacked the necessary jurisdiction because the relevant sale and purchase agreements between the homebuyers and the developers were entered into before 1 December 2002 ('the appointed date'), *ie*, the date on which the Housing Developers (Control And Licensing) (Amendment) Act 2002 ('the Amending Act') came into force. The learned judge had found that the Amending Act could not operate retrospectively – regard being had to art. 7(1) of the Federal Constitution and considering the penal nature of s. 16AD of the Housing Developers (Control And Licensing) Act 1966 ('the HDCLA') as amended by s. 25 of the Amending Act.

Held (allowing the appeal)
Per Richard Malanjum JCA delivering the judgment of the court:

[1] It is true that the jurisdiction of the tribunal (Tribunal for Homebuyer Claims) to hear and determine a homebuyer's claim – arising out of a sale and purchase agreement entered into before the appointed date – is not expressly spelt out in the Amending Act. Nevertheless, statutes must always be read as a whole. The literal interpretation is not applicable in each and every case, and the nature and purpose of a particular piece of legislation may have to be considered so as not to defeat the intention of Parliament. Indeed, the HDCLA, as amended by the Amending Act, is a piece of beneficent social legislation and, for this reason, its provisions should be given a liberal and purposive interpretation. (pp 624 f-g & 625 a-d)

[2] The date of the sale and purchase agreement entered into between a homebuyer and a developer is **not** material in determining the jurisdiction of the tribunal to adjudicate a claim lodged by the homebuyer. Sections 16N of the HDCLA – which harnesses the general jurisdiction of the tribunal as set out in s. 16M thereof – does **not** stipulate a jurisdictional cut-off point by reference to the date of the sale and purchase agreement entered into between the homebuyer and the developer. The only jurisdictional limitations contained in s. 16N(2) of the HDCLA are that the claim is: (a) based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer; and (b) brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement. Apart from these, there are **no** other limitations. It is, consequently, obvious that it could **not** have been the intention of Parliament that the tribunal would have no

jurisdiction to hear and determine homebuyers' claims arising from sale and purchase agreements entered into before the appointed date. (pp 625 g-h, 626 a-b, e-g & 627 c-f)

[3] Section 16AD of the HDCLA should be read in its proper perspective and should also be given a purposive interpretation. The section does **not** stipulate that the breach of a sale and purchase agreement between a homebuyer and a developer is per se a crime. A breach simpliciter only gives the homebuyer a right to lodge a claim against the developer. The criminal aspect of s. 16AD of the HDCLA is triggered, **not** by a breach simpliciter, but by a failure on the part of the developer to comply with an award of the tribunal. In other words, s. 16AD of the HDCLA does **not** penalise the breach but rather the failure to comply with the award handed down by the tribunal after adjudicating a claim arising from the breach of a sale and purchase agreement (irrespective of its date). The very breach itself is **not** criminalised; hence, the issue of retrospective criminal law *vis-a-vis* s. 16AD of the HDCLA does **not** arise. (pp 622 d-e, 628 b-h, 629 a-c & 630 b-c)

[Tribunal has jurisdiction to hear and determine homebuyers' claims arising from sale and purchase agreements entered into before appointed date.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan responden/pemaju untuk perintah *certiorari* bagi membatalkan award perayu/tribunal yang berpihak kepada penuntut/pembeli rumah. Dalam membenarkan permohonan pemaju, Mahkamah Tinggi, selain dari mengisytiharkan award-award berkenaan sebagai tak sah, ultra vires dan batal serta tak berkesan, juga mengisytiharkan bahawa tribunal tidak mempunyai bidangkuasa untuk mendengar dan memutuskan tuntutan pembeli rumah untuk gantirugi tertentu atas kelewatan penyerahan, dan berikutnya mengeluarkan perintah menghalang tribunal dari mengadili halperkara tersebut. Secara intinya, ianya diputuskan bahawa tribunal tidak berbidangkuasa oleh kerana perjanjian jual beli di antara pembeli-pembeli rumah dan pemaju itu telah dimeterai sebelum 1 Disember 2002 ('tarikh yang dilantik'), iaitu, tarikh di mana Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 ('Akta Pindaan') mula berkuatkuasa. Yang arif hakim mendapati bahawa Akta Pindaan tidak boleh berkuatkuasa secara kebelakangan – mengambilkira fasal 7(1) Perlembagaan Persekutuan dan sifat menghukum yang terdapat pada s. 16AD Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('HDCLA') sebagaimana ianya dipinda oleh s. 25 Akta Pindaan.

Diputuskan (membenarkan rayuan)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

[1] Adalah benar bahawa bidangkuasa tribunal (Tribunal Tuntutan Pembeli Rumah) untuk mendengar dan memutuskan tuntutan seorang pembeli rumah – yang berbangkit dari perjanjian jual beli yang dimeterai sebelum tarikh yang dilantik – tidak dinyatakan secara terus dan jelas oleh Akta Pindaan. Namun, sesuatu statut itu harus dibaca secara keseluruhan. Tafsiran literal tidak boleh dilaksanakan kepada setiap kes, dan sifat serta tujuan sesuatu perundangan harus dipertimbang bagi mengelak dari mensesiakan maksud Parlimen. HDCLA, sepertimana ianya dipinda oleh Akta Pindaan, pada hakikatnya adalah satu perundangan untuk kebajikan sosial dan, oleh kerana itu, tafsiran yang liberal dan purposif harus diberikan kepada peruntukan-peruntukannya.

[2] Tarikh perjanjian jual beli yang dimeterai di antara pembeli rumah dan pemaju adalah tidak penting dalam menentukan bidangkuasa tribunal untuk mengadili tuntutan yang dibuat oleh pembeli rumah. Seksyen 16N HDCLA – yang merangkum bidangkuasa am tribunal seperti yang dibentang dalam s. 16M – tidak memperuntukkan suatu sempadan bidangkuasa dengan cara merujuk kepada tarikh perjanjian jual beli yang dimeterai di antara pembeli rumah dan pemaju. Had bidangkuasa di sisi s. 16N(2) HDCLA hanya berbangkit jika tuntutan: (i) dilandas kepada kausa tindakan yang berbangkit dari perjanjian jual beli yang dimeterai di antara pembeli rumah dan pemaju perumahan berlesen; (ii) dibuat oleh pembeli rumah sebelum dua belas bulan dari tarikh pengeluaran sijil layak duduk atau dari tarikh luput tempoh tanggungan kecacatan seperti yang terkandung dalam perjanjian jual beli. Selain dari itu, tidak terdapat apa-apa had lain. Ianya dengan itu jelas bahawa, bukanlah menjadi niat Parlimen bahawa tribunal tidak harus mempunyai bidangkuasa untuk mendengar dan memutuskan tuntutan-tuntutan pembeli rumah yang berbangkit dari perjanjian jual beli yang dimeterai sebelum tarikh yang dilantik.

[3] Seksyen 16D HDCLA harus dibaca dalam perspektifnya yang betul dan harus diberikan tafsiran purposif. Seksyen ini tidak memperuntukkan bahawa kemungkiran terhadap perjanjian jual beli di antara pembeli rumah dan pemaju adalah suatu jenayah per se. Kemungkiran semata-mata hanya memberikan hak kepada pembeli rumah untuk membuat tuntutan terhadap pemaju. Aspek jenayah s. 16AD HDCLA dibangkit, bukan oleh kemungkiran semata-mata, tetapi oleh kegagalan di pihak pemaju untuk mematuhi award yang dibuat oleh tribunal. Dengan lain perkataan, s. 16AD HDCLA tidak menghukum kemungkiran tetapi sebaliknya menghukum

kegagalan untuk mematuhi award yang diberikan oleh tribunal selepas mengadili sesuatu tuntutan yang berbangkit dari kemungkiran perjanjian jual beli (tanpa mengira apakah tarikhnya). Kemungkiran semata-mata tidak dijenayahkan; oleh itu, isu undang-undang jenayah yang berkuatkuasa secara kebelakangan *vis-a-vis* s. 16AD HDCLA adalah tidak berbangkit.

Tribunal berbidangkuasa mendengar dan memutuskan tuntutan pembeli rumah yang berbangkit dari perjanjian jual beli yang dimeterai sebelum tarikh yang dilantik.]

Case(s) referred to:

Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia [2002] 4 CLJ 689 CA ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Energoprojek (M) Holdings v. PP [1996] 4 CLJ 571 HC ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(foll)***

Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor [2001] 3 CLJ 547 FC ***(foll)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***

Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 FC ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1987] 1 MLJ 39 ***(refd)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

The Colonial Sugar Refining Co, Ltd v. Irving [1905] AC 369 ***(refd)***

Legislation referred to:

Federal Constitution, art. 7

Housing Developers (Control and Licensing) Act 1966, ss. 16M, 16N, 16O, 16R, 16AD, 22C

Housing Developers (Control and Licensing) (Amendment) Act 2002, ss. 25, 32(2)

(Civil Appeal No: W-01-54-03

For the appellant - Abdul Gani Patail (Azhar Mohamad, Umi Kalthum Abd Majid); A-G's Chambers

For the respondent - Sree Harry; M/s Sri Ram & Co

(Civil Appeal No: W-01-55-03)

For the appellant - Abdul Gani Patail (Azhar Mohamad, Umi Kalthum Abd Majid); A-G's Chambers

For the respondent - Lambert Rasa-Ratnam (Sean Yeow Huang Meng, Mong Chung Seng & Foo Joon Liang); M/s Lee Hishamuddin

(Civil Appeal No: W-02-758-03)

For the appellants - KL Wong (KY Soo); M/s KL Wong

For the respondent - Sree Harry; M/s Sri Ram & Co

(Civil Appeal No: W-02-759-03)

For the appellants - Viola Lettice De Cruz (Maureen Ong Swee Kin); M/s VL Decruz & Co

For the respondent - Sree Harry; M/s Sri Ram & Co

(Civil Appeal No: W-02-760-03)

For the appellants - Yong Yung Choy (Mohd Noh Nasira & Soon Lay Kheng); M/s Nasira Aziz & Co

For the respondent - Sree Harry; M/s Sri Ram & Co

*[**Editor's note:** the respondent in Civil Appeal No: W-01-55-03 has filed for leave to appeal to the Federal Court vide Federal Court Civil Application No: 0-8-5-2004(W)]*

Reported by Gan Peng Chiang

JUDGMENT

Richard Malanjum JCA:

On 18 December 2003 we allowed the appeals by the appellants. And upon agreement of the parties we made no order as to costs. In giving our short oral judgment we stated that we were unanimous in our decision. We expressed our view that the Tribunal has the jurisdiction to entertain and to adjudicate upon claims lodged with it notwithstanding the sale and purchase agreements were entered into before 1 December 2002. And accordingly the issue of retrospectivity of s. 16AD *vis-a-vis* an award given by the Tribunal should not arise. We also stated that we would give our reasons later. We do so now.

These appeals arose from the decision of the court below granting the respondents, *inter alia*, an order of certiorari to quash the awards handed down by the Tribunal in respect of several claims lodged by the claimants/homebuyers, a declaration that the said awards given were invalid, ultra vires, null and void and of no consequence, that the Tribunal had no jurisdiction to hear and determine the claims lodged by the claimants/homebuyers thereof and an order prohibiting the Tribunal from hearing such claims.

Since the issue of jurisdiction of the Tribunal in relation to sale and purchase agreements entered into before 1 December 2002 was common to all the appeals it was therefore agreed that we should hear them together.

We emphasize here that the issue of jurisdiction of the Tribunal is being questioned only in relation to sale and purchase agreements entered into by the claimants/homebuyers before 1 December 2002, a crucial date, since that was when the Tribunal began to function *vide* gazette notification P.U.(B) 353/2002 ('the appointed date').

Now, it was not in dispute that the claimants/homebuyers lodged their claims with the Tribunal for liquidated damages in connection with the late delivery of homes purchased by them from the respective respondents, being the licensed housing developers.

As background, the Tribunal came into existence with the passing of the Housing Developers (Control and Licensing) (Amendment) Act 2002 (the Amending Act). The principal statute is the Housing Developers (Control and Licensing) Act 1966 ('the Principal Act'). And for clarity the sections referred to in this Judgment are sections of the Principal Act as amended.

Prior to the orders rendered by the court below the Tribunal heard claims which were brought before it irrespective of the dates of the sale and purchase agreements. However the respondents herein held a view otherwise. Several applications were therefore filed by way of notice of motion for judicial review.

With the agreement of all parties the learned judge in the court below heard one application with binding effect on the others. And on 4 September 2003 the learned judge rendered judgment wherein he granted the relief sought for by the respondents with the net effect that the Tribunal was for all intents and purposes rendered incapable to hear claims based on sale and purchase agreements entered into before the appointed date.

The gist of the decision of the learned judge is that in the absence of any express provision to the contrary the Amending Act has no retrospective effect on sale and purchase agreements entered into before the appointed date. He held that to do so would be an infringement of art. 7 of the Federal Constitution in view of the provision whereby penalty could be imposed for any failure to comply with an award handed down by the Tribunal. Indeed the learned judge considered that any failure to comply with an award granted by the Tribunal would merely be an extension of the breach upon which the award was given. The learned judge was also of the view that to allow retrospective effect of the jurisdiction of the Tribunal would result in the substantive rights of the respondents being affected to their prejudice.

Before us the learned Attorney General argued, *inter alia*, that the Tribunal has the jurisdiction to hear and determine claims based on a sale and purchase agreement entered into prior to the appointed date. He referred to s. 16N(2) thereof. And he contended that s. 16R admits the possibility of a retrospective application of the said section. He went on to point out that assent to the Amending Act was given on 23 January 2002 followed by the publication on 31 January 2002 but it only came into force on 1 December 2002 together with the Regulations providing for the procedure to be observed by the Tribunal. That according to him indicates the intention of applying s. 16N(2) retrospectively.

The reference by the learned judge to s. 32(2) of the Amending Act which extended the application of the new s. 22C in the Principal Act as being a specific indication of retrospective intention as opposed to the absence of similar provision in s. 16N(2) thereof was noted by the learned Attorney General as erroneous in view of the limited purpose of that section.

For the respondents it was submitted that s. 16N(2) has no application to the notion of retrospectivity. That section simply serves to limit the jurisdiction of the Tribunal where it has jurisdiction by virtue of s. 16M. And it was further submitted that if it was the intention of Parliament to allow retrospective effect, it would have done so by inserting a similar provision to that of the new s. 22C of the Principal Act.

Learned counsel for the respondents gave the reasons why this court must not construe the jurisdiction of the Tribunal as having retrospective effect. Firstly it was contended that to do so would effectively be allowing a criminal provision enacted into the Principal Act *vide* the Amending Act to have retrospective effect in the absence of any specific enabling provision. Learned counsel of course was referring to the provision whereby there would be a penalty imposed for failing to comply with an award granted by the Tribunal. Secondly the fact that a criminal provision was incorporated should indicate that there was no intention to legislate with retrospective effect bearing in mind the strong presumption against statutes with criminal consequence to operate retrospectively.

The diametrically opposed contentions of the parties before us demand close scrutiny of the relevant provisions brought about by the Amending Act. And having done so we agree that whilst there is no provision expressly specifying the jurisdiction of the Tribunal in respect of sale and purchase agreements entered into before the appointed date, we do not think such fact should be taken as affirming the argument of the respondents. To do so would be contrary to a settled principle of law that statutes must be read as a whole. (See: *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559). And literal interpretation of a statute is not applicable in all cases. There are circumstances where the nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament. (See: *Akberdin bin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia* [2002] 4 CLJ 689; *Sea Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305).

In the instant case we are of the view that the Principal Act as amended by the Amending Act is a piece of social legislation and hence its provisions should be given liberal and purposive interpretation. In the case of *Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547 the Federal Court speaking through his Lordship Steve Shim CJ (Sabah and Sarawak) on the Industrial Relations Act 1967 said this at p. 554:

> Quite clearly, the IRA is a piece of social legislation whose primary aim is to promote social justice and industrial peace and harmony in the country. As such, the approach to interpretation must be liberal in order to achieve the object aimed at by Parliament. This had been described by Lord Diplock as the 'purposive approach', an approach followed by Lord Denning in *Nothman v. Barnet London Borough Council* [1978] 1 WLR 220, who reiterated that in all cases involving the interpretation of statutes, we should adopt a construction that would promote the general legislative purpose underlying the provision. We accept that to be the correct approach.

A similar view was also expressed by the Federal Court in the case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 where it was said at p. 707:

> Now, it is well settled that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with well settled canons of construction, such legislation must receive a liberal and not a restricted or rigid interpretation. If authority is required for this proposition, it is to be found in the decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 2 CLJ 748. The three interconnected definitions which were cited by Salleh Abas LP in his judgment in Inchcape as well as s. 20 (under which the instant respondent's case was referred to the Industrial Court) appear in a statute requiring liberal interpretation and for that reason should themselves be liberally interpreted. per Gopal Sri Ram JCA.

Applying therefore the liberal and purposive approach to the statutory provisions that deal with the jurisdiction of the Tribunal we find that the argument advanced for the respondents is premised on at least two assumptions. Firstly, that the date in a sale and purchase agreement is material in determining the jurisdiction of the Tribunal. Secondly, any award given for a breach of a sale and purchase agreement entered into prior to the appointed date, particularly where the breach was before that date, would tantamount to allowing criminal law to operate retrospectively since it is now punishable being an offence for any failure to comply with or satisfy such award. This argument of course

relates to the legal principle that criminal law cannot be made to operate retrospectively unless specifically stipulated. (See: *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645).

With respect, we find the first assumption to be without any basis. There is nothing in the provisions establishing the Tribunal or related thereto which can be said to support it. In our view while s. 16M sets out the general jurisdiction of the Tribunal, it is s. 16N and in particular sub-s. 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal. Section 16N(2) reads:

Limitation of jurisdiction.

(1) Except as expressly …

(2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.

Sub-section 16N(2) does not stipulate a cut off point by reference to date of agreement *vis-a-vis* jurisdiction. All that is required of the Tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of sub-s. 16N(2), that is to say:

(a) whether the claim is based 'on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer; and

(b) whether the claim is 'brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.'

We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators. That was echoed in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 with these words:

> It must always be borne in mind that we are Judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The Court has nothing to do with the policy of any Act which it may be called upon to interpret. per Seah SCJ at page 39.

In fact the need for a sale and purchase agreement as a condition-precedent in filing a claim has also been waived by sub-s. 16N(3) thereof which states that '(N)otwithstanding sub-s. (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation.'

To limit therefore the jurisdiction of the Tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the Tribunal which Parliament never intended to do so. It is absurd in our view to say that Parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which Parliament intended to address when it legislated for the establishment of the Tribunal. As stated earlier, being a piece of social legislation a liberal and purposive approach should be adopted when construing the legislative provisions governing the threshold jurisdiction of the Tribunal.

In respect of the second assumption, such approach came about in view of s. 16AD. It reads:

> **Criminal penalty for failure to comply.**
>
> (1) Any person who fails to comply with an award made by the Tribunal within the period specified therein commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) In the case of a continuing offence, the offender shall, in addition to the penalties under subsection (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after conviction.

However, that section should be read in its proper perspective and should be given a purposive interpretation as well. At any rate nothing stipulated therein could be understood to mean that a breach of a sale and purchase agreement between a homebuyer and a licensed housing developer is a crime *per se*. A breach only gives a homebuyer the right to claim against a licensed housing developer. And prior to the establishment of the Tribunal such claim could only be filed in the civil court. In fact a claim that is not within the ambit of ss. 16M and 16N remains outside the jurisdiction of the Tribunal though s. 16O is an exception.

Accordingly in our opinion s. 16AD only comes into play when there is a failure on the part of a licensed housing developer to comply with an award given by the Tribunal. In other words the criminal aspect of the provision only arises when there is a failure to abide by an award of the Tribunal and not due to a breach of a sale and purchase agreement upon which a claim is made. It is in fact equivalent to an execution proceeding as generally understood in the civil court. Thus we are not persuaded by the argument that s. 16AD has made an award handed down by the Tribunal synonymous to a breach of a sale and purchase agreement. A breach is a cause giving rise to a claim while an award is a relief.

Put in another way, s. 16AD does not penalize a licensed housing developer for a breach simpliciter of a sale and purchase agreement. The penalty only comes into play when there is a failure to comply with or satisfy an award handed down by the Tribunal after adjudicating a claim based on a breach of a sale and purchase agreement irrespective of its date. That in our view is a fair, liberal and purposive interpretation of the section. And since the Tribunal only began to function from the appointed date the question of an award handed down before that date and the application of s. 16AD for failure to comply does not arise.

We are conscious of the counter-argument that without a breach in the first place there is no question of an award being given by the Tribunal and without an award there is no issue of penalty arising. And if a breach occurred before the appointed date that would effectively be criminalizing an act retrospectively.

With respect, a distinction should be drawn between a breach of the sale and purchase agreement and an award rendered arising from such breach. As we have stated earlier on it is not the breach of the sale and purchase agreement that has been criminalized. Rather it is the failure to comply with or satisfy any award given by the Tribunal in connection with any claim made pursuant to such breach. At any rate section 16AD does not empower the Tribunal to impose any penalty. It only provides for a defaulter to be subject to prosecution which invariably is the task of another authority in a separate criminal proceeding. And on being prosecuted a defaulter is at liberty to raise in defence the inapplicability of the section to him. Such approach was successful in the case of *Energoprojek (M) Holdings v. Public Prosecutor* [1996] 4 CLJ 571. Accordingly, we do not think s. 16AD is intended to take away any substantive right of any person. Neither is it meant to affect or limit the jurisdiction of the Tribunal in any manner howsoever.

The reference to s. 22C thereof by way of comparison to indicate the intention of Parliament is irrelevant in our opinion. That provision is only an enabling section in relation to another matter and is not related to the issue of jurisdiction of the Tribunal. Section 22C provides:

> **Right to initiate and maintain actions.**
>
> Notwithstanding anything contained in any written law or any rule of law, a homebuyer as defined in section 16A shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the purchaser and that housing developer unless a contrary intention is expressed in any agreement, assignment or charge between the homebuyer and his financier in which case the prior written consent of his financier must first be obtained before he exercises any of his rights under this section.
>
> (2) Every agreement, assignment or charge lawfully entered into between a purchaser and his financier before the appointed date shall be subject to, and the parties thereto shall be entitled to the benefits of, the new section 22C of the principal Act as inserted into the principal Act by subsection (1).

It was also the contention of learned counsel for the respondents that in view of the penalty attached with the establishment of the Tribunal, to allow it therefore to hear a claim based on a sale and purchase agreement entered into before the appointed date would affect and prejudice the substantive rights of the respondents.

In our view such argument is focused on the presence of the penalty for default in complying with an award handed down by the Tribunal. And for the reasons we have given hereinabove, in particular, on the penalty *vis-a-vis* the award issue, we do not think it has any merit.

It is to be noted that the establishment of the Tribunal is in effect a creation of another forum intended for speedy disposal at a minimum cost of prescribed claim up to the limit of RM25,000 by a homebuyer against a licensed housing developer for breach of a sale and purchase agreement entered into by the parties. There is therefore no question of the rights of anyone being eroded or removed as was envisaged in *The Colonial Sugar Refining Company, Limited v. Irving* [1905] AC 369 (PC). (See also: *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529).

And although it may be argued that the imposition of penalty has a prejudicial effect, such preposition may be true if it is the breach of a sale and purchase agreement that has been criminalized. But here it is not the case.

As regards the other points raised in the course of the argument we have considered them but in view of our conclusion herein there is no necessity for us to expressly deal with each one of them. It would not alter our conclusion in any event.

Accordingly for the foregoing reasons we allowed the appeals.

My learned brothers have read this judgment in draft and agree with its contents.